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Sixty-seventh session
Geneva, 4 May-5 June and 6 July-7 August 2015

Draft report of the International Law Commission on the work of its sixty-seventh session

Rapporteur: Mr. M. **Vázquez-Bermúdez**

Chapter I
Introduction

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Chapter I

Introduction

1. The International Law Commission held the first part of its sixty-seventh session from 4 May to 5 June 2015 and the second part from 6 July to 7 August 2015 at its seat at the United Nations Office at Geneva. The session was opened by Mr. Shinya Murase, First Vice-Chairman of the sixty-sixth session of the Commission.

A. Membership

2. The Commission consists of the following members:

Mr. Mohammed Bello Adoke (Nigeria)

Mr. Ali Mohsen Fetais Al-Marri (Qatar)

Mr. Lucius Caflisch (Switzerland)

Mr. Enrique J.A. Candioti (Argentina)

Mr. Pedro Comissário Afonso (Mozambique)

Mr. Abdelrazeg El-Murtadi Suleiman Gouider (Libya)

Ms. Concepción Escobar Hernández (Spain)

Mr. Mathias Forteau (France)

Mr. Juan Manuel Gómez-Robledo (Mexico)

Mr. Hussein A. Hassouna (Egypt)

Mr. Mahmoud D. Hmoud (Jordan)

Mr. Huikang Huang (China)

Ms. Marie G. Jacobsson (Sweden)

Mr. Maurice Kamto (Cameroon)

Mr. Kriangsak Kittichaisaree (Thailand)

Mr. Roman A. Kolodkin (Russian Federation)[1]

Mr. Ahmed Laraba (Algeria)

Mr. Donald M. McRae (Canada)

Mr. Shinya Murase (Japan)

Mr. Sean D. Murphy (United States of America)

Mr. Bernd H. Niehaus (Costa Rica)

Mr. Georg Nolte (Germany)

Mr. Ki Gab Park (Republic of Korea)

Mr. Chris Maina Peter (United Republic of Tanzania)

Mr. Ernest Petrič (Slovenia)

[1] See para. 3 below.

Mr. Gilberto Vergne Saboia (Brazil)

Mr. Narinder Singh (India)

Mr. Pavel Šturma (Czech Republic)

Mr. Dire D. Tladi (South Africa)

Mr. Eduardo Valencia-Ospina (Colombia)

Mr. Marcelo Vázquez-Bermúdez (Ecuador)

Mr. Amos S. Wako (Kenya)

Mr. Nugroho Wisnumurti (Indonesia)

Mr. Michael Wood (United Kingdom of Great Britain and Northern Ireland)

B. Casual vacancy

3. On 8 May 2015 the Commission elected Mr. Roman A. Kolodkin to fill the casual vacancy occasioned by the resignation of Mr. Kirill Gevorgian.

C. Officers and the Enlarged Bureau

4. At its 3244th meeting, on 4 May 2015, the Commission elected the following officers:

Chairman:	Mr. Narinder Singh (India)
First Vice-Chairman:	Mr. Amos S. Wako (Kenya)
Second Vice-Chairman:	Mr. Pavel Šturma (Czech Republic)
Chairman of the Drafting Committee:	Mr. Mathias Forteau (France)
Rapporteur:	Mr. Marcelo Vázquez-Bermúdez (Ecuador)

5. The Enlarged Bureau of the Commission was composed of the officers of the present session, the previous Chairmen of the Commission [2] and the Special Rapporteurs.[3]

6. The Commission set up a Planning Group composed of the following members: Mr. Amos S. Wako (Chairman), Mr. L. Caflisch, Mr. P. Comissário Afonso, Mr. A. El-Murtadi Suleiman Gouider, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr. H.A. Hassouna, Mr. M.D. Hmoud, Mr. H. Huang, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. B.H. Niehaus, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. P. Šturma, Mr. D.D. Tladi, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

D. Drafting Committee

7. At its 3245th, 3250th, 3257th, 3261st, 3269th, 3278th and 3280th meetings, on 5, 13 and 27 May and on 3 June and 14, 24 and 29 July 2015, the Commission established a Drafting Committee, composed of the following members for the topics indicated:

[2] Mr. L. Caflisch, Mr. E. Candioti, Mr. M. Kamto, Mr. B.H. Niehaus, Mr. E. Petrič and Mr. N. Wisnumurti.

[3] Ms. C. Escobar Hernández, Mr. J.M. Gómez-Robledo, Ms. M. G. Jacobsson, Mr. M. Kamto, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. D.D. Tladi, Mr. E. Valencia-Ospina and Mr. M. Wood.

(a) *Identification of customary international law*: Mr. M. Forteau (Chairman), Mr. M. Wood (Special Rapporteur), Mr. M.D. Hmoud, Mr. H. Huang, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. P. Sturma, Mr. D.D. Tladi, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(b) *Protection of the atmosphere*: Mr. M. Forteau (Chairman), Mr. S. Murase (Special Rapporteur), Mr. M.D. Hmoud, Mr. H. Huang, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(c) *Crimes against humanity*: Mr. M. Forteau (Chairman), Mr. S.D. Murphy (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr D.M. McRae, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(d) *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*: Mr. M. Forteau (Chairman), Mr. G. Nolte (Special Rapporteur), Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. K.G. Park, Mr. P. Šturma, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(e) *Protection of the environment in relation to armed conflicts*: Mr. M. Forteau (Chairman), Ms. M.G. Jacobsson (Special Rapporteur), Ms. C. Escobar Hernández, Mr. J.M. Gomez-Robledo, Mr. M.D. Hmoud, Mr. H. Huang, Mr. K. Kittichaisaree, Mr. D.M. McRae, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. G.V. Saboia, Mr. P. Šturma, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(f) *Immunity of State officials from foreign criminal jurisdiction*: Mr. M. Forteau (Chairman), Ms. C. Escobar Hernández (Special Rapporteur), Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. M. Kamto, Mr. K. Kittichaisaree, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. G.V. Saboia, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

(g) *Provisional applications of treaties*: Mr. M. Forteau (Chairman), Mr. J.M. Gomez-Robledo (Special Rapporteur), Ms. C. Escobar Hernández, Mr. M. Kamto, Mr. R.A. Kolodkin, Mr. D.M. McRae, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

8. The Drafting Committee held a total of ... meetings on the eight topics indicated above.

E. Study Group

9. At its 3249th meeting on 12 May 2015, the Commission reconstituted the following Study Group:

(a) *Study Group on Most-Favoured-Nation clause*: Mr. D.M. McRae (Chairman), Mr. L. Caflisch, Mr. M. Forteau, Mr. M.D. Hmoud, Mr. M. Kamto, Mr. S. Murase, Mr. S.D. Murphy, Mr. K.G. Park, Mr. N. Singh, Mr. P. Šturma, Mr. D.D. Tladi, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

10. The Planning Group reconstituted the following Working Group:

Working Group on Long-term Programme of work for the quinquennium: Mr. D. McRae (Chairman), Mr. L. Caflisch, Ms. C. Escobar Hernández, Mr. M. Forteau, Mr.

H.A. Hassouna, Mr. M.D. Hmoud, Ms. M.G. Jacobsson, Mr. K. Kittichaisaree, Mr. A. Laraba, Mr. S. Murase, Mr. S.D. Murphy, Mr. G. Nolte, Mr. K.G. Park, Mr. E. Petrič, Mr. N. Singh, Mr. P. Šturma, Mr. D.D. Tladi, Mr. A.S. Wako, Mr. N. Wisnumurti, Mr. M. Wood, and Mr. M. Vázquez-Bermúdez (*ex officio*).

F. Secretariat

11. Mr. Miguel de Serpa Soares, Under-Secretary-General and United Nations Legal Counsel, represented the Secretary-General. Mr. George Korontzis, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission and, in the absence of the Legal Counsel, represented the Secretary-General from 4 May to 5 June 2015. Mr. Huw Llewellyn, Principal Legal Officer, served as Principal Assistant Secretary. Upon the retirement of Mr. George Korontzis and the appointment of Mr. Huw Llewellyn as Director of the Codification Division of the Office of Legal Affairs, Mr. Huw Llewellyn served as Secretary to the Commission from 8 June 2015. Mr. Trevor Chimimba and Mr. Arnold Pronto, Senior Legal Officers, served as Senior Assistant Secretaries. Ms. Hanna Dreifeldt-Lainé and Mr. David Nanopoulos, Legal Officers, served as Assistant Secretaries to the Commission.

G. Agenda

12. At its 3244th meeting, on 4 May 2015, the Commission adopted an agenda for its sixty-seventh session consisting of the following items:

1. Organization of the work of the session.
2. Immunity of State officials from foreign criminal jurisdiction.
3. Subsequent agreements and subsequent practice in relation to the interpretation of treaties.
4. The Most-Favoured-Nation clause.
5. Provisional application of treaties.
6. Identification of customary international law.
7. Protection of the environment in relation to armed conflicts.
8. Protection of the atmosphere.
9. Crimes against humanity.
10. Programme, procedures and working methods of the Commission and its documentation.
11. Date and place of the sixty-eighth session.
12. Cooperation with other bodies.
13. Other business.

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Rapporteur: Mr. M. **Vázquez-Bermúdez**

Chapter II
Summary of the work of the Commission at its sixty-seventh session

1. With regard to the topic "**Protection of the atmosphere**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/681 and Corr.1 (Chinese only)), which, upon a further analysis of the draft guidelines submitted in the first report, presented a set of revised draft guidelines relating to the Use of terms, the Scope of the draft guidelines, and the Common concern of humankind, as well as draft guidelines on the General obligation of States to protect the atmosphere and on International cooperation. Following its debate on the report, the Commission decided to refer draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report to the Drafting Committee, with the understanding that draft guideline 3 be considered in the context of a possible preamble. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft guidelines 1, 2 and 5 and four preambular paragraphs, together with commentaries (chap. IV).

2. As regards the topic "**Identification of customary international law**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/682), which contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations, as well as particular custom and the persistent objector. Following the debate in Plenary, the Commission decided to refer the draft conclusions contained in the third report to the Drafting Committee. The Commission took note of the interim report of the Drafting Committee, including the eight draft conclusions and additional paragraphs for two of the draft conclusions provisionally adopted by the Drafting Committee during the last session, which was submitted to the Commission for information (chap. V).

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3. With respect to the topic "**Crimes against humanity**", the Commission considered the first report of the Special Rapporteur (A/CN.4/680), which contained, *inter alia*, two draft articles relating respectively to the prevention and punishment of crimes against humanity and to the definition of crimes against humanity. Following the debate in Plenary, the Commission decided to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted four draft articles, together with commentaries thereto (chap. VI).

4. As regards the topic "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/683), which contained, *inter alia*, one draft conclusion relating to constituent instruments of international organizations. Following the debate in Plenary, the Commission decided to refer the draft conclusion proposed by the Special Rapporteur to the Drafting Committee. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted draft conclusion 11, together with commentary thereto (chap. VII).

5. With respect to the topic "**Protection of the environment in relation to armed conflicts**", the Commission had before it the second report of the Special Rapporteur (A/CN.4/685), which, *inter alia*, identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. The report contained five draft principles and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms. Following the debate in Plenary, the Commission decided to refer the draft preambular paragraphs and the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee, with the understanding that the provision on "Use of terms" was referred for the purpose of facilitating discussions and to be left pending by the Drafting Committee at this stage. The Commission took note of the interim report of the Chairman of the Drafting Committee, including the ... draft principles provisionally adopted by the Committee, which was presented to the Commission for information (chap. VIII).

6. In relation to the topic "**Immunity of State officials from foreign criminal jurisdiction**", the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/686), which was devoted to the consideration of the remaining aspects of the material scope of immunity *ratione materiae*, namely what constituted an "act performed in an official capacity, and its temporal scope. The report contained proposals of draft article 2(f) defining an "act performed in an official capacity" and draft article 6 on scope of immunity *ratione materiae*. Following the debate in Plenary, the Commission decided to refer the draft two draft articles to the Drafting Committee. The Commission took note of the interim report of the Chairman of the Drafting Committee, including the ... draft articles provisionally adopted by the Committee, which was presented to the Commission for information (chap. IX).

7. As regards the topic "**Provisional application of treaties**", the Commission had before it the third report of the Special Rapporteur (A/CN.4/687) which considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties, of 1969, and the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, of 1986. The debate revealed support for undertaking further analysis of the legal effects of the provisional application of treaties, including its termination, and the effect of the application of other provisions of the Vienna Convention on the Law of Treaties, of 1969. The

Commission further referred the six draft guidelines, proposed by the Special Rapporteur, to the Drafting Committee. The Commission took note of the interim report of the Chairman of the Drafting Committee, including the ... draft articles provisionally adopted by the Committee, which was presented to the Commission for information (chap. X).

8. In relation to the topic "**The Most-Favoured-Nation clause**", the Commission received and welcomed with appreciation the final report on the work of the Study Group on the Most Favoured-Nation clause and endorsed in paragraphs ... to ... the summary conclusions of the Study Group. The Commission commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination. The Commission has thus completed its consideration of the topic (chap. ...).

9. The Commission established a Planning Group to consider its programme, procedures and working methods (chap. ..., sect. ...). The Commission decided to include the topic "*Jus cogens*" in its programme of work, and to appoint Mr. Dire Tladi as Special Rapporteur for the topic (chap. ..., sect. ...).

10. The Commission continued its exchange of information with the International Court of Justice, the Asian-African Legal Consultative Organization, the Inter-American Juridical Committee, the Committee of Legal Advisers on Public International Law of the Council of Europe and the African Union Commission on International Law. The United Nations High Commissioner for Human Rights also addressed the Commission. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross.

11. The Commission decided that its sixty-eighth session be held in Geneva from ... May to ... June and ... July to ... August 2016 (chap. ..., sect. ...).

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Chapter III
Specific issues on which comments would be of particular interest to the Commission

A. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

1. The Commission requests, by 31 January 2016, States and international organizations:

(a) to provide it with any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and

(b) to provide it with any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

B. Protection of the environment in relation to armed conflicts

2. The Commission reiterates its request to States to provide information, by 31 January 2016, on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would particularly appreciate receiving examples of:

(a) treaties, including relevant regional or bilateral treaties;

(b) national legislation relevant to the topic, including legislation implementing regional or bilateral treaties;

(c) case law in which international or domestic environmental law was applied to disputes in relation to armed conflict.

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3. The Commission would also invite information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict, for example, national legislation and regulations; military manuals, standard operating procedures, Rules of Engagement or Status of Forces Agreements applicable during international operations; and environmental management policies related to defence-related activities. The Commission would, in particular, be interested in instruments related to preventive and remedial measures.

C. Immunity of State Officials from foreign criminal jurisdiction

4. The Commission requests States to provide information, by 31 January 2016, on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

D. Provisional application of treaties

5. The Commission once again reiterates its request to States to provide information, by 31 January 2016, on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:

(a) the decision to provisionally apply a treaty;

(b) the termination of such provisional application; and

(c) the legal effects of provisional application.

E. *Jus cogens*

6. The Commission requests States to provide information, by 31 January 2016, relating to its practice on the nature of *jus cogens*, the criteria for its formation and the consequences flowing therefrom as expressed in:

(a) official statements, including official statement before legislatures, courts and international organizations; and

(b) decisions of national and regional courts and tribunals, including quasi-judicial bodies.